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IN THE
COURT OF APPEALS OF INDIANA

DAVID A. JORDAN, III,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 48A04-0703-PC-125
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable Thomas Newman, Jr., Judge
Cause Nos. 48D03-0108-CF-270, 48D03-0109-CF-295, and 48D03-0011-DF-346

October 18, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

David A. Jordan, III appeals the denial of his petition for post-conviction relief from his convictions for domestic battery[1] as a Class A misdemeanor, criminal confinement[2] as a Class D felony, two counts of burglary,[3] each as a Class B felony, two counts of stalking,[4] each as a Class C felony, criminal mischief[5] as a Class B misdemeanor, and battery[6] as a Class A misdemeanor.[7] He appeals raising one issue, which we restate as whether he received ineffective assistance of counsel because he claims that his guilty plea was not knowing, intelligent, and voluntary and was based on an inadequate factual basis for the crime of stalking.

We affirm.

FACTS AND PROCEDURAL HISTORY

On September 7, 2000, Jordan struck Charity Zank, his girlfriend, on the left side of her face and locked the door of the house, not allowing her to leave. As a result, he was charged with criminal confinement and domestic battery. On July 22, 2001, Jordan broke into Zank's house, despite having received notice of the existence of a

[1] *See* IC 35-42-2-1.3.

[2] *See* IC 35-42-3-3.

[3] *See* IC 35-43-2-1.

[4] *See* IC 35-45-10-5.

[5] *See* IC 35-43-1-2.

[6] *See* IC 35-42-2-1.

[7] Jordan additionally pled guilty to two counts of invasion of privacy, each as a Class B misdemeanor, but these counts were later dismissed at the sentencing hearing.

protective order prohibiting him from contacting her. While inside of Zank's house, Jordan damaged the stereo, a fish tank, and a car windshield. As a result of this incident, Jordan was charged with burglary, stalking, invasion of privacy, and criminal mischief. On August 16, 2001, Jordan again broke into Zank's house, despite the existence of a protective order, and while there, Jordan struck Zank across the face, causing an injury that required fifteen stitches. The State charged Jordan with burglary, stalking, invasion of privacy, and battery.

Jordan pled guilty to all of the above charges and was represented by counsel. The plea agreement provided that in exchange for pleading guilty to the above charges, the State would dismiss charges under two additional cause numbers. Sentencing was to run concurrently within each cause number, but the total sentence in each cause number would run consecutively to each other. Sentencing was otherwise under the trial court's discretion. During the plea hearing, the following exchange occurred:

> Trial Court: Okay. Mr. Chaille will lay the basis for the plea. I'd like for you [to] listen, Mr. [Jordan]. I'll ask you when he finishes if you agree or not with what he said. Mr. Chaille?
>
> State of Indiana: . . . beginning with cause number 0011-DF-346, if that case were to proceed with trial, the State is prepared to present evidence to show that on or about September 7 of 2000, in Madison County, State of Indiana, the defendant, who's in court today, David A. Jordan, III, did knowingly confine another person without the other person's consent, that person being Charity B. Zank, in a residence located at 905 Laurel Street, Anderson, Madison County, Indiana without her consent, against her will. With respect to Count II on that same case, on or about September 7 of 2000 in Madison County, State of Indiana, David A. Jordan, III, same individual who's in court today, did knowingly touch another person, who he was living with as if a spouse at that time, that person

being Charity B. Zank, in a rude, insolent, or angry manner, by striking her on the left side of her face resulting in bodily injury, that being redness to her face which was observed by law enforcement officers and a complaint of pain on part of Charity Zank. With respect to cause number 0108-CF-270, Counts I, II, and IV, the State is prepared to present evidence that would show that on or about July 27, 2001 in Madison County, Indiana, the defendant, David A. Jordan, III, did break and enter the dwelling of another person, that being the residence of Charity B. Zank, with the intent to commit a felony therein, that being stalking, as a Class C felony. The residence in question, Judge, is 2232 Sherman Street, here in Anderson, Madison County, Indiana. With respect to Count II, on or about July 22 [sic], 2001 in Madison County, State of Indiana, the defendant, David A. Jordan, III, did stalk another person, that being Charity B. Zank and during that time there was a protective order issued protecting Charity B. Zank from David A. Jordan, III. And David A. Jordan, III had been given actual notice of that protective order issued out of Madison County Court I, under cause number 48E01-010-DF-325. And with respect to Count IV, in that case, on or about July 27, 2001 in Madison County, Indiana, the defendant, David A. Jordan, III, did knowingly damage or deface the property of another person, that being a stereo and or fish tank belonging to Charity B. Zank without the consent of Charity B. Zank. It might also cover other property, Judge, a car windshield. All of the events in that case occurred here in Madison County, Indiana. And finally with respect to cause number 0109-CF-295, Counts I, II, and IV again, the State is prepared to present evidence that on or about August 16, 2001, in Madison County, State of Indiana, the defendant, who's in court today, David A. Jordan, III, did break and enter the structure or dwelling of another person, that being the residence of Charity B. Zank located at 2232 Sherman Street, here in Anderson, Madison County, Indiana. And when he entered that residence he had the intent to commit a felony therein, that being stalking as a Class C felony. With respect to Count II, [on] or about August 16, 2001 in Madison County, State of Indiana, the defendant, who's in court today, David A. Jordan, III did

stalk another person, that being Charity B. Zank, during the time that there was a valid protective order as a condition of pre-trial release, protecting Charity B. Zank from David A. Jordan in effect. That protective order had been issued out of Madison County Court I, under cause number 48E01-010-DF-325, and later transferred to Superior Court III under cause number 48D03-0011-DF-346. The State would also show that the defendant had actual notice of that protective order being in effect. And with respect to Count IV, the State would show that on or about August 16, 2001 in Madison County, State of Indiana, the defendant, who's in court today, David A. Jordan, III, did knowingly touch another person, that being Charity B. Zank, in [a] rude, insolent, or angry manner, giving rise to bodily injury to Charity B. Zank. The defendant did strike Charity B. Zank resulting in pain, swelling, and/or bleeding to various parts of her body. All of the charges in these cases occurred in Madison County, State of Indiana.

Trial Court: Mr. Jordan, were you able to hear him?

Defendant: Yes, sir.

Trial Court: Any objection to anything he said?

Defendant: No, sir.

Trial Court: Mr. Lawrence, any questions of your client or any advantage if this went [to] trial?

Defense Counsel: No advantage, your Honor . . . .

Pet'r's Ex. 2 at 7-11. Jordan then pled guilty to all of the charges.

The trial court sentenced Jordan to an aggregate sentence of forty-three years for all of the offenses. Jordan filed a pro se petition for post-conviction relief, which was later amended by counsel. At the evidentiary hearing on the petition, an affidavit by Jordan's trial counsel was admitted, which stated that counsel had "no memory of the specific events

surrounding this case." *Pet'r's Ex*. 3. Jordan testified that he did not understand the charge of stalking. *Tr*. at 7-9. He testified that he believed he was pleading guilty to burglary with the intent to commit stalking because when he broke and entered Zank's house, there was a protective order in place that he violated. *Id*. at 6-7, 12-13. Jordan also stated that he was not informed that a necessary element of stalking is a course of conduct involving repeated or continuing harassment and that he would not have pleaded guilty had he known the elements of stalking. *Id*. at 8-9. The post-conviction court issued its findings of fact and conclusions of law denying post-conviction relief. Jordan now appeals.

DISCUSSION AND DECISION

Post-conviction proceedings do not afford the petitioner an opportunity for a super appeal, but rather, provide the opportunity to raise issues that were unknown or unavailable at the time of the original trial or the direct appeal. *Ben-Yisrayl v. State*, 738 N.E.2d 253, 258 (Ind. 2000), *cert. denied* (2002); *Wieland v. State*, 848 N.E.2d 679, 681 (Ind. Ct. App. 2006), *trans. denied, cert. denied*. The proceedings do not substitute for a direct appeal and provide only a narrow remedy for subsequent collateral challenges to convictions. *Ben-Yisrayl*, 738 N.E.2d at 258. The petitioner for post-conviction relief bears the burden of proving the grounds by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5).

When a petitioner appeals a denial of post-conviction relief, he appeals a negative judgment. *McCary v. State*, 761 N.E.2d 389, 391 (Ind. 2002). The petitioner must establish that the evidence as a whole unmistakably and unerringly leads to a conclusion contrary to that of the post-conviction court. *Id*. We will disturb a post-conviction court's decision as being contrary to law only where the evidence is without conflict and leads to but one

conclusion, and the post-conviction court has reached the opposite conclusion. *Id*. at 391-92. The post-conviction court is the sole judge of the weight of the evidence and the credibility of witnesses. *Fisher v. State*, 810 N.E.2d 674, 679 (Ind. 2004). We accept the post-conviction court's findings of fact unless they are clearly erroneous, and no deference is given to its conclusions of law. *Id*.

We review ineffective assistance of trial counsel claims under the two-prong test set out in *Strickland v. Washington*, 466 U.S. 668 (1984). *Wieland*, 848 N.E.2d at 681. First, the petitioner must demonstrate that counsel's performance was deficient, which requires a showing that counsel's representation fell below an objective standard of reasonableness and denied the petitioner the right to counsel guaranteed by the Sixth Amendment to the United States Constitution. *Timberlake v. State*, 753 N.E.2d 591, 603 (Ind. 2001), *cert. denied* (2002). Second, the petitioner must demonstrate that he was prejudiced by the counsel's deficient performance. *Id*. To show prejudice, a petitioner must show that there is a reasonable probability that the outcome of the trial would have been different if counsel had not made the errors. *Id*. A probability is reasonable if it undermines confidence in the outcome. *Id*.

We presume that counsel rendered adequate assistance and give considerable discretion to counsel's choice of strategy and tactics. *Smith v. State*, 765 N.E.2d 578, 585 (Ind. 2002). The two prongs of this test are separate and independent inquiries, and thus, "'[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed.'" *Williams v. State*, 706 N.E.2d 149, 154 (Ind. 1999), *cert. denied* (2000) (quoting *Strickland*, 466 U.S. at 697).

Jordan specifically argues that he received ineffective assistance of his trial counsel because counsel did not advise him of the elements of stalking and allowed him to enter a plea that was not knowing, intelligent, and voluntary because he was not aware of the elements of stalking. He also contends that his guilty plea was not supported by an adequate factual basis.

To show that counsel's performance prejudiced him, a petitioner who pled guilty must show a reasonable probability that he would have been acquitted had he gone to trial. *Segura v. State*, 749 N.E.2d 496, 499 (Ind. 2001); *State v. Van Cleave*, 674 N.E.2d 1293, 1299-1300 (Ind. 1996), *cert. denied* (1998). Alleging that the petitioner would not have pled guilty and would have merely gone to trial but for counsel's performance, is not sufficient to establish prejudice. *Segura*, 749 N.E.2d at 507; *Van Cleave*, 674 N.E.2d at 1302. Citing *Sial v. State*, 862 N.E.2d 702 (Ind. Ct. App. 2007), Jordan alleges that in order to prove prejudice, he must only show a reasonable probability that the hypothetical reasonable defendant would have elected to go to trial if properly advised. *Id*. at 705. *Sial*, however, discussed a claim of prejudice resulting from incorrect advice as to the penal consequences. *Id*. at 703. In *Segura*, our Supreme Court reiterated that in order to prove prejudice in a case where a claim of ineffective assistance of counsel is related to a defense or failure to mitigate a penalty, a reasonable probability of a more favorable result in a competently run trial must be shown. 749 N.E.2d at 507. However, when a claim of ineffective assistance is related to penal consequences, a petitioner must establish, by objective facts, circumstances that support the conclusion that counsel's errors in advice were material to the decision to plead guilty. *Id*.

Jordan has not shown a reasonable probability that he would have been acquitted of the offenses had he gone to trial. At the post-conviction hearing, the only evidence presented by Jordan to undermine his guilty plea was his self-serving testimony that he did not understand the elements of the offense of stalking. He testified that he would not have pleaded guilty to stalking if he had known that one of the elements of the offense was that there must be a course of conduct involving repeated or continuing harassment. *Tr*. at 8-9. Jordan did not present any evidence that he did not engage in such a course of conduct; he only claimed that his counsel had not made him aware of the elements of stalking. No evidence was presented that established that Jordan would have been acquitted if he had gone to trial. Because Jordan has not shown that the evidence as a whole unmistakably and unerringly leads to a conclusion contrary to that of the post-conviction court, we conclude that the post-conviction court did not err in denying his petition.

Affirmed.

ROBB, J., and BARNES, J., concur.